

No. 21638 ✓

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

In the Matter of

HUBBARD'S INC., a New Mexico corporation, together  
with its wholly owned subsidiaries, RANKINS DEPART-  
MENT STORES, INC., a California corporation, and  
WEILL'S INC., a California corporation,  
Bankrupt.

---

APPELLANT'S OPENING BRIEF.

---

GOLDMAN & GOLDMAN,

408 South Spring Street,  
Los Angeles, Calif. 90013,

*Attorneys for Wohl Shoe Company.*

FILED

MAY 11 1967

WM. B. LUCK, CLERK

MAY 17 1967



## TOPICAL INDEX

	Page
Statement of Facts .....	1
Summary of Argument .....	4
Argument with Points and Authorities .....	5
A Trust Relationship Was Created Between Wohl Shoe Company and Rankin's by the Terms of the Agreement Existing Between Them .....	5
The Trust Property Continues Subject to the Trust Even After the Bankruptcy of Rankin's, Trustee Herein .....	8
There Is No Necessity to Trace the Funds in the Hands of Either the Receiver or the Other Re- spondent, Commercial Discount Corporation ..	9
It Is Not Necessary That the Concession Agree- ment Between Rankin's and Wohl Shoe Com- pany Be Recorded Since the Uniform Commer- cial Code Was Not in Effect in California at That Time .....	10

## TABLE OF AUTHORITIES CITED

Cases	Page
Bainbridge v. Stoner, 16 Cal. 2d 423, 428 (1940) .....	5
Breeze v. Brooks, 97 Cal. 72 (1892) .....	6
City of New York v. Rassner, 127 F. 2d 703 (C.A. 2d 1942) .....	9
George Walter & Sons, Re, 10 F. 2d 463 .....	8
Newcomb Interests, Inc., In re, 171 Fed. Supp. 704 (1959) .....	6
Owins v. Laugharn, 53 Cal. App. 2d ..... (1942) ..	6
Pearlman v. Reliance Ins. Co., 371 U.S. 132, 9 L. Ed. 190, 83 S. Ct. 232 .....	8, 9
Prudence Bomis Corp. Re, 79 F. 2d 212 .....	8
Riverside State Bank v. Ernest, 199 F. 2d 874 .....	5
Rogal, In re, 112 Fed. Supp. 712 (1953) .....	6
Schaefer v. Berinstein, 180 Cal. App. 2d 107 (1960) .....	6
Stanwood v. Sage, 22 Cal. 517 (1863) .....	5
State of New Jersey v. U. S. Steel Company, 95 A. 2d 740 (1932) .....	7
U. S. National Bank in Johnstown v. Blauner's et al., 75 F. 2d 826 (C.A. 3rd 1935) .....	10
Warner Quinian Co., Re, 86 F. 2d 103 (C.A. 2d 1936) .....	9
Yeager Co., In the Matter of, 315 F. 2d 864 (1963) .....	7

Statutes	Page
9 American Jurisprudence 2d, Sec. 902, p. 674 .....	8
California Civil Code, Sec. 2216 .....	5
California Civil Code, Sec. 2217 .....	5
California Civil Code, Sec. 2220 .....	5
California Civil Code, Sec. 2223 .....	5
California Civil Code, Sec. 2224 .....	5
California Uniform Commercial Code, Sec. 10101 ..	10
California Uniform Commercial Code, Sec. 10102 ..	10

Textbooks	
4 Collier on Bankruptcy (14th Ed.), Sec. 70.15 ....	8
Gilbert's Collier on Bankruptcy (4th Ed.), Sec. 1487 .....	8
Restatement of Trusts 2d, Sec. 179, p. 388 .....	6



No. 21638

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

In the Matter of

HUBBARD'S INC., a New Mexico corporation, together  
with its wholly owned subsidiaries, RANKINS DEPART-  
MENT STORES, INC., a California corporation, and  
WEILL'S INC., a California corporation,

Bankrupt.

---

## APPELLANT'S OPENING BRIEF.

---

### Statement of Facts.

The facts of this case have been stipulated between the parties and that stipulation dated and filed August 17, 1965, has been submitted and is listed on the Index as Page 27 on this appeal.

Reference is made specifically to the Concession License Agreement dated February 2, 1960, and in particular to paragraphs 5, 7, 11, 12, 13, 16, and 17. They are further set out herein to wit:

#### "CONCESSION FEE

5. In consideration of said license and privilege herein granted. Concessionee shall pay as a concessions fee each term year a sum equal to ten per cent (10%) of its net cash sales and twelve per cent (12%) of its net charge sales made in and from the departments. In addition, Concessioner



will charge Concessionee its pro rata share of S & H Green Stamps issued monthly, the total of which shall not be in excess of two per cent (2%) of net sales.”

#### “REMITTANCES

7. Concessionee’s sales shall be turned over to Concessioner who shall remit for same in the following manner: On Wednesday of each week for all net sales, cash and charge, made during the preceding calendar week ending on Saturday. From the remittances, Concessioner shall deduct the Concession Fee provided for hereinabove, together with any and all incidental expenses, if any, authorized by Concessionee and which may have been paid by Concessioner for or on Concessionee’s account during the entire preceding calendar week. In the event this agreement is terminated by lapse of time or otherwise, Concessioner shall make full settlement at once, for all sales, cash and charge, made by Concessionee, up to and including the final day’s sales in Concessionee’s departments.”

#### “ACCOUNTING

11. Concessioner shall keep a true and correct account of all monies received, growing out of Concessionee’s authorization and shall exhibit same to Concessionee or its representative upon reasonable request made. Concessionee shall keep a true and correct account of all sales and Concessioner shall, at reasonable times, have access to said accounts. Both parties hereto shall have the right to examine not only the books of account, but also all sales slips and other records pertaining thereto.”



#### “PAYROLL

12. Concessionee shall keep its own payroll records, and when approved by it, shall present same to Concessioner, who shall pay same, with the exception of the manager's salary, out of the monies in Concessioner's hands which are due Concessionee, and shall be deducted therefrom when making the remittances as provided in paragraph 7 hereinabove.”

#### “PURCHASING

13. Concessionee shall have exclusive charge of purchasing all merchandise for its departments, and all said merchandise shall be purchased in the name of and upon the credit of Concessionee and paid for directly by it.

#### “TRUST FUND

16. All sales, cash and charge, shall be made in the name of Concessioner and shall be recorded by Concessioner at its expense. All monies received by Concessionee's employees, representing proceeds from said sales, shall immediately be turned over to Concessioner who shall hold same in absolute trust for Concessionee; and, though commingled with other funds of Concessioner's, same shall nevertheless be and remain in trust for Concessionee until paid Concessionee in accordance with the provisions of paragraph #7 hereinabove.”

#### “CHARGE SALES GUARANTEE

17. All charge sales made by Concessionee shall be submitted to Concessioner for approval which shall not be unreasonably withheld. Concessioner

shall act as Concessionee's agent in collecting and recording said charge sales and shall bear all expenses incident thereto. Concessioner guarantees the payment of all charge sales made by Concessionee and approved by Concessioner."

The Wohl Shoe Company which is also known as Wetherby Kayser Shoe Company filed an Application to Reclaim proceeds of accounts receivable arising out of the sales of shoes and related items made by Wetherby-Kayser Shoe Company also known as Wohl Shoe company while it was a concessionee in a Department store operated by Rankin Department Stores, Inc. which is a subsidiary of Hubbard's, a New Mexico Corporation, and which said Department store was located in California.

An order of the Referee was entered in April 22, 1966, denying the relief sought by Wohl Shoe Company. This order was reviewed by Wohl Shoe Company, and an order affirming the Referee's order was entered and filed on September 23, 1966.

### **Summary of Argument.**

The Referee and the Judge found that there was no trust relationship between the parties, whereas the agreements state that the relationship is one of the creation of a trust and not a creditor-debtor relationship as the Court found.

## ARGUMENT.

### A Trust Relationship Was Created Between Wohl Shoe Company and Rankin's by the Terms of the Agreement Existing Between Them.

The paragraph of the Concession Lease Agreement quoted in The Stipulation of Facts clearly establishes a trust relationship between Rankin's, as Trustee, and Wohl Shoe Company, as Beneficiary. The various state laws and their interpretation govern the decision of a federal court regarding what property passes to the Trustee of a bankrupt estate.

*Riverside State Bank v. Ernest*, 199 F. 2d 874.

The proceeds of the trust subject to the Trust Agreement, are trust funds held for the benefit of Wohl Shoe Company and all who hold such proceeds are voluntary or involuntary trustees of same as the beneficial interest in these proceeds from the sale of the shoes was never transferred from Wohl Shoe Company, nor was it ever intended.

California Civil Code §§ 2216, 2217, 2220, 2223, 2224;

*Bainbridge v. Stoner*, 16 Cal. 2d 423, 428 (1940).

wherein the Court commented on and explained the voluntary and involuntary trusts and the manner of their creation.

*Stanwood v. Sage*, 22 Cal. 517 (1863),

wherein it was held that the proceeds from sale of consigned goods did not enter the estate of the decedent consignee.

The trust is enforceable in bankruptcy or allied proceedings so long as the subject of the trust is ascertain-



able and it not held by a bona fide purchaser or the beneficiary did not knowingly permit the trustee to claim title as his own for the purposes of obtaining credit.

*In re Newcomb Interests, Inc.*, 171 F. Supp. 704 (1959);

*In re Rogal*, 112 F. Supp. 712 (1953);

*Breeze v. Brooks*, 97 Cal. 72 (1892);

*Schaefer v. Berinstein*, 180 Cal. App. 2d 107 (1960);

*Owins v. Laugharn*, 53 Cal. App. 2d ..... (1942).

It is the Applicant's position that an express trust was created by the terms of the Concession License Agreement entered into between Wohl Shoe Company and Rankin's on February 2, 1960. The essentials of the trust are set forth and they are in writing. The understandings of the trustee and the beneficiary are stated clearly.

It is irrelevant to the proper creation of a trust that the terms of the trust agreement contemplate commingling of the trust property with other property of the trustee.

*Restatement of Trusts 2d*, Sec. 179, p. 388.

It is there stated:

"By the terms of the trust the trustee may be permitted to mingle trust property with his own property. It may be expressly so provided by the terms of the trust or the character of the trust may be such as to make this proper. In the case of a formal trust, such as a trust created by will

or deed of trust, mingling by the trustee of trust property with his own property is improper, unless it is clearly permitted by the terms of the instrument. In the case of an informal trust such mingling is proper if such is the understanding of the parties as shown by their agreement or by custom. In such a case the trustee is not liable if he keeps on hand the amount of the trust property. Thus, a stockbroker who receives a customer's money for the purchase of certain securities or who sells certain securities for his customer under circumstances creating a trust of the money and not merely a debt . . . may be permitted to deposit the money in his own account in a bank, and, if so, he is not liable for breach of trust if the amount on deposit is not diminished by withdrawals or otherwise below the aggregate amount to which his customers are entitled."

See also, *State of New Jersey v. U. S. Steel Company*, 95 A. 2d 740 (1932) and *In the Matter of Yeager Co.*, 315 F. 2d 864 (1963). The latter case is quite similar on its facts to the instant case, with the exception that there was no express written trust agreement between the lessor and the beneficiary-lessee. In the *Yeager* case, the lessees of a department store were to turn over their cash and credit sales to the lessor. The lessor was to account to the lessees at a definite time and was to remit to them the net amount over rent and other agreed deductions. The court held that the lessor and the lessees had a debtor-creditor relationship as respects the credit sales when the les-

sees' petition for reclamation was denied after the lessor filed bankruptcy. However, the court states:

"Although nowhere in the lease was a trust provided for, they urge that one should be implied. . . . Since none was proven, it is unnecessary for us to go into the problem of tracing . . ."

As is evident, in the instant case, we have a written express trust agreement that was in full force and effect prior to and at the time of the bankruptcy.

### **The Trust Property Continues Subject to the Trust Even After the Bankruptcy of Rankin's, Trustee Herein.**

*Gilbert's Collier on Bankruptcy*, 4th Ed., Sec. 1487 states:

"If the property in the hands of the bankrupt is impressed with a trust the property continues subject to the same trust, notwithstanding its bankruptcy . . . But the existence of a trust must be established before a claim can be made on that ground."

See also *Collier on Bankruptcy*, 14th Ed., Vol. 4, Sec. 70.15. In 9 *Am. Jur. 2d*, Sec. 902, p. 674, it is stated:

"Property held by the bankrupt in trust does not pass to the trustee in bankruptcy free from the interest of the beneficiaries, but is subject to reclamation by the beneficiaries if it can be traced and identified in the assets."

In support of the above proposition, see *Re Prudence Bomis Corp.*, 79 F. 2d 212 and *Re George Walter & Sons*, 10 F. 2d 463. In *Pearlman v. Reliance Ins. Co.*,



371 U.S. 132, 9 L. Ed. 190, 83 S. Ct. 232 Mr. Justice Black, in dealing with an argument under the Bankruptcy Act, stated:

“Ownership of property rights before bankruptcy in one thing; priority of distribution in bankruptcy of property that has passed unencumbered into a bankrupt’s estate is quite another. Property interests in a fund not owned by a bankrupt at the time of adjudication, whether complete or partial, legal equitable, mortgages, liens, or simple priority of rights, are of course not a part of the bankrupt’s property and do not vest in the trustee. *The Bankruptcy Act simply does not authorize a trustee to distribute other people’s property among a bankrupt’s creditor.*” (Emphasis added.)

It is Wohl Shoe Company’s position that the Receiver in Bankruptcy and Commercial Discount Corporation are attempting to distribute funds belonging to Wohl Shoe Company.

**There Is No Necessity to Trace the Funds in the Hands of Either the Receiver or the Other Respondent, Commercial Discount Corporation.**

(*Re: Warner Quinian Co.*, 86 F. 2d 103 (C.A. 2d 1936)). Held that a trust relationship established between the parties allows that proceeds of the trust to be part of the trust even where there is no language of a separate account where there is a consignment agreement between the parties.

It was held in *City of New York v. Rassner*, 127 F. 2d 703 (C.A. 2d 1942), that where the mingling of the trust funds takes place after bankruptcy, no tracing

is necessary by one claiming as the beneficiary of a trust.

It was further held in *U.S. National Bank in Johnstown v. Blauner's et al.* (75 F. 2d 826 (C.A. 3rd 1935)). It was held that a trust would be established where lessees occupied space in bankrupt's department store and the bankrupt was trustee or agent for the collection of money due on credit sales.

**It Is Not Necessary That the Concession Agreement Between Rankin's and Wohl Shoe Company Be Recorded Since the Uniform Commercial Code Was Not in Effect in California at That Time.**

*The California Uniform Commercial Code* provides in Sections 10101 and 10102 as follows:

§ 10101. Effective date

"This code shall become effective on January 1, 1965. It applied to transactions entered into and events occurring after that date."

§ 10102. Provision for Transition: Continuation Statement.

"Transactions validly entered into before the effective date specified in Section 10101 and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this act as though such repeal or amendment has not occurred;"

The agreement between Rankin's and Wohl Shoe Company has created a trust which is enforceable against Rankin's representative and Commercial Discount Corporation, who took, subject to notice of said

trust, and the trust should be declared valid as against the Receiver and Commercial Discount Corporation, and the funds turned over to Wohl Shoe Company.

Wherefore, it is respectfully prayed that the order of September 23, 1966, affirming Referee's order of April 22, 1966, be vacated and set aside and an order be entered that the receiver turn back to Wohl Shoe Company the property of Wohl Shoe Company.

Respectfully submitted,

LEONARD A. GOLDMAN,  
*Attorney for Wohl Shoe Company.*

Dated May 10, 1967, at Los Angeles, California.



### **Certificate.**

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEONARD A. GOLDMAN

